Americold Services, Inc. *and* Roderick R. Bradley.
Case 17–CA–18464

June 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 26, 1997, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. On March 7, 1997, the judge issued an erratum to his decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an exception, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Americold Services, Inc., Kansas City, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have attached a notice to employees which was inadvertently omitted from the judge's decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT create the impression of surveillance of employees' union activities.

WE WILL NOT threaten employees with loss of benefits for supporting the Union.

WE WILL NOT threaten the employees by stating that the employees will start back at zero if they choose to be represented by a union.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

AMERICOLD SERVICES, INC.

Stanley D. Williams, Esq., for the General Counsel.
Mark G. Flaherty, Esq., of Kansas City, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried in Kansas City, Missouri, on January 9 and 10, 1997. The charge was filed February 20, 1996,[1] and an amended charge was filed on April 25, by Roderick R. Bradley (Bradley). On July 10, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint). The complaint alleges that Americold Services, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by coercively interrogating employees about their union activities, and by making threatening statements to employees. The complaint further alleges that Respondent violated Section 8(a)(3) of the Act by suspending Bradley on February 16, and then terminating him on February 21, because he had engaged in union activities. On July 18, Respondent filed an answer denying the commission of any unfair labor practices.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Americold Services, Inc., a corporation, is engaged in the business of providing cold storage services at its facility in Kansas City, Kansas, where during a 12-month period ending February 28, it purchased and received goods and materials valued in excess of $50,000 shipped from points outside of the State of Kansas. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are in 1996 unless otherwise indicated.

The complaint alleges, the answer admits, and I find that at all material times the International Brotherhood of Teamsters, AFL–CIO, Teamsters Local 838 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent stores frozen food products in its underground facility and then ships them by rail and truck. In addition to this location, there are approximately 50 Americold facilities within the United States performing cold storage services, approximately half of which have a union representing their employees. In February 1996, Respondent employed about 65 warehouse employees at its Kansas City facility, who were responsible for the loading and unloading of millions of pounds of frozen food from rail cars and trucks, storing the product and then reloading it for shipment to a designated location.

Respondent's supervisors include: General Manager Mark Anderson, Operations Manager Alan Wiberg, Superintendent Bill Bourquin, and Supervisor Jimmy Joseph Hoyle. All of these individuals are supervisors within the meaning of Section 2(11) of the Act.[2]

In 1987, the Union represented Respondent's warehouse employees and during that year called an economic strike. At the conclusion of the strike in 1987, the Union was decertified and since that time it has not been the collective-bargaining representative of Respondent's employees.

B. *The Alleged Threats and Coercive Interrogation Addressed to Employee Leonita Green*

Beginning in late January and early February 1996, warehouse employee Leonita Green began meeting with representatives of the Union to discuss organizing the Kansas City facility. Green testified that in February 1996, as the main union organizer, she solicited and handed out union literature to employees on a regular basis at the facility.

General Manager Mark Anderson testified that he became aware of the union organizing no later than early February 1996, when employees began openly discussing the organizing drive with their supervisors. It was at this time that Anderson found out that the Union was trying to organize the employees. From that point on, the Respondent took the position that it did not want the Union to represent its employees and gave speeches and passed out literature explaining its position why this particular Union should not be brought into the facility again to represent employees.

On February 8, while Green was working on dock 2 around the office area, Anderson approached her and in the presence of Supervisor Hoyle said to Green, "I have heard rumors about a union trying to organize, what is this I hear about you trying to organize or get a union?" Green said that "we need protection" and Anderson responded, "Well you guys don't know what you are getting into, we would start back to zero and would lose everything, you know, that we had at the time, benefits and stuff like that. I don't know why people would want to get a union, I have an open door policy." Green testified that Anderson made the above statements and Hoyle's testimony supports Green. Anderson denied saying anything like that, but I credit Green and Hoyle.[3]

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct that reasonably tends to interfere with restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Almet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

In weighing the likely impact of an alleged threat by an employer, the trier of the facts "must take into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

I conclude that the statements Supervisor Anderson made to Green on February 8 tended to coerce and restrain employees in the exercise of their Section 7 rights and that they violated Section 8(a)(1) of the Act as alleged in paragraph 5(a) of the complaint. Employer statements creating the impression that protected employee activities are under surveillance violate the Act. *Flexsteel Industries*, 311 NLRB 257 (1993). Here, the credited evidence shows that in early February 1996 Anderson approached Green and said, "I have heard rumors about a union trying to organize, what is this I hear about you trying to organize or get a union?" Such statements tend to coerce employees in the exercise of rights guaranteed in Section 7 the Act.

The test for evaluating the legality of an interrogation is whether, assessing the totality of the circumstances, the questioning, viewed from the employees' perspective, would reasonably have tended to restrain, coerce or interfere with employees' exercise of their rights. *Rossmore House*, 269 NLRB 1176, 1177–1178 fn. 20 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006, 1007–1009 (9th Cir. 1985). The evidence shows that Anderson specifically asked Green, "What is this I hear about you trying to organize or get a union?" Lastly, I find the statements made by Anderson that, "We would start back to zero and would lose everything, you know, that we had at the time, benefits and stuff like that. I don't know why people would want to get a union, I have an open door policy," clearly interfere with employee rights. See *Tube-Lok Products*, 209 NLRB 666, 669 (1974) (futility of selecting a union as collective-bargaining representative); *ConAgra, Inc.*, 248 NLRB 609, 615 (1980) (threatening employees with loss of benefits), and *TRW-United Greenfield Div.*, 245 NLRB 1135, 1138 (1979) (threat that employer will bargain from scratch if employees vote for unionization).

The General Counsel also alleges in paragraph 5(b) of the complaint that Hoyle made statements to Bradley violative of

[2] The Respondent's answer admits their status.

[3] At the time of the February 8 conversation, Hoyle was Green's supervisor. Hoyle was terminated on July 23, because of his inability to follow repeated management instructions and because of his penchant for giving opinions to employees on how collective-bargaining negotiations would proceed with a union at the Respondent. In July 1996, there was active union organizing ongoing at the Kansas City facility, and another labor organization won an election to represent Respondent's employees. I credit Hoyle because his testimony was made in a frank and persuading fashion despite his stated feelings of hostility toward the Respondent due to his termination.

Section 8(a)(1) of the Act. For the same reasons discussed above regarding the credibility of Hoyle, I find that Hoyle did not tell Bradley on February 24, at the Quik Trip Store, that the Employer discharged him because of his union activities. With respect to the second portion of paragraph 5(b) of the complaint, that Hoyle told Bradley that the Respondent wanted to fire another employee because of that employee's union activities, not only did Hoyle deny that he said any such thing but the General Counsel offered no evidence to support it.

Accordingly, I recommend that the allegations set forth in paragraph 5(b) of the complaint be dismissed.

C. *The Alleged Discriminatory Suspension and Termination of Employee Roderick Bradley*

On February 15, Bradley and employee Paul Wiltsey were in the locker room around 3:45 p.m. just before quitting time. Bradley, while Wiltsey was leaning against his locker, pointed towards Wiltsey with an open box knife and said to Wiltsey, "I better join the Union or he was going to cut my balls off." Wiltsey responded, "What I do is my own f—king business." Wiltsey and Bradley then separately went to the timeclock outside the locker room to punch out. While Wiltsey was waiting in line to punch out, he asked fellow employee Patrick Ratigan whether he knew the name of the individual who was standing ahead of him. Ratigan told Wiltsey that he was an employee from another section of the facility but that he was all right. Wiltsey drove Ratigan home that day but they did not discuss the incident. Ratigan spoke with Wiltsey later that evening because he thought Wiltsey was unusually quiet during the ride home. During this telephone conversation, Wiltsey told Ratigan about the box knife incident and the threat the employee made to him.

On the morning of February 16, Wiltsey told Hoyle that he had his first conflict about the Union. He told Hoyle the exact words that the individual said to him, but that he did not know the name of the person who had made the threat or whether it was serious. Hoyle, who testified that the above conversation took place, asked Wiltsey on several occasions what he wanted to do about the matter? Wiltsey told Hoyle that he wanted to handle it by himself. Later that morning, Hoyle informed General Manager Anderson about the incident and told him that Wiltsey did not know the name of the individual who had made the threat. Anderson told Hoyle to bring Wiltsey to his office to discuss the matter further. Wiltsey and Hoyle went to Anderson's office and Wiltsey told Anderson what the individual said to him on the prior evening. Since Wiltsey was unable to identify the individual, Anderson asked Wiltsey to describe him. Wiltsey gave a general description of the individual and Hoyle said it sounded like Bradley. Wiltsey told Anderson, during this meeting, that he had a concern for his family's safety as he took the threat seriously and he would handle the matter himself. Anderson told Wiltsey that he did not want him to handle the matter himself and asked if he saw the individual, could he recognize him? Wiltsey said "yes," and Anderson told Hoyle to drive Wiltsey around the facility. Hoyle drove directly to dock 27 because he knew Bradley worked in that area. On arriving at dock 27, Hoyle was told by Superintendent Bill Bourquin that Bradley was working in the salvage area. Bourquin took Wiltsey to this location and while driving through the salvage area, Wiltsey saw Bradley and told Bourquin that he was the individual who made the threat on February 15. After returning to dock 27, Hoyle told Wiltsey to take his time and prepare a statement of what happened the prior day.[4] Wiltsey told Hoyle that he did not feel comfortable about preparing a statement and he wanted to go home. Hoyle said that was fine and Wiltsey left work early on that day. After Wiltsey left for the day, Anderson asked to see Bradley in the conference room and told him that another employee said that Bradley had made threats concerning the Union and pointed a box knife at the employee. Bradley told Anderson that he did not make any threats regarding the Union or display a box knife to any employee on the prior day. Anderson told Bradley that because of this serious allegation by another employee, he had determined to suspend Bradley until the matter had been fully investigated. If the investigation did not establish that the incident took place, Bradley would be brought back to work but if the evidence showed otherwise, he would be terminated.

On the evening of February 16, Anderson telephoned Wiltsey at home to see how he was feeling and during the conversation asked him to provide a written statement of the incident and bring it to work on the following Monday. After finishing the telephone conversation with Anderson, Wiltsey called Green and told her he needed to get in touch with Bradley. He told Green that a situation took place at work that got out of hand and he did not want Bradley to lose his job especially as Anderson wanted him to prepare a written statement of what happened during the incident. Green had three-way conference capabilities and was able to get Bradley on the telephone conversation. Green left the conference call and Wiltsey and Bradley continued their conversation. Wiltsey asked Bradley why he pulled a knife and made threatening statements to him? Bradley told Wiltsey that he was sorry, that it was horseplay and he did not intend to do anything. Wiltsey and Bradley agreed that a statement would be prepared that denied that the incident took place and it would be given to Anderson the following Monday. During the telephone conversation, Wiltsey and Bradley scheduled a meeting for the next day at Builders Square, a local building and hardware store. In anticipation of this Saturday meeting, Bradley had his spouse prepare and type a statement that the incident between the two of them did not occur.

On Saturday, Wiltsey and Bradley met for about 20 minutes at Builders Square and Bradley again told Wiltsey that he was sorry about what took place. Wiltsey signed the typewritten statement and then he and Bradley drove to Wiltsey's house so the statement could be cosigned by a witness. Wiltsey kept two copies of the signed statement and on Monday, February 19, went directly to Anderson's office. Wiltsey gave Anderson a copy of the signed statement. Anderson asked Wiltsey, that despite what the statement said, did the incident take place? Wiltsey told Anderson that the threat and the incident did take place but he wanted to put the matter behind him and did not want Bradley to lose his job.

On the next day, February 20, Wiltsey met with General Manager Anderson and Respondent Attorney Flaherty. Wiltsey told them that the incident did occur and he wanted to put the matter behind him. Prior to February 20, Anderson interviewed a number of employees concerning whether they

[4] Hoyle had previously provided a statement to Anderson of what Wiltsey told him about the February 15 incident.

had heard or saw anything involving the February 15 incident, but other then several employees telling Anderson that they saw Wiltsey and Bradley talking in the locker room on that day, no one with whom he spoke was able to assist in the investigation.[5] After reviewing the evidence from the investigation, Anderson together with Attorney Flaherty made a decision on February 20, to terminate Bradley for engaging in the February 15 incident.

On the next day, February 21, Anderson had a meeting with Bradley, his spouse Lisa, and Attorney Flaherty. A tape recording and transcript of this meeting was introduced into evidence. It confirms, consistent with the testimony of record, that Bradley continued to deny that the incident took place or that he had met or talked to Wiltsey over the weekend. At the conclusion of the meeting, Bradley was given his termination notice. Later that day, Anderson met with individual groups of employees at their loading dock locations and told them that Bradley had been fired and he would not tolerate any threats or incidents of violence involving the Union.

Under the Board's decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1992), the General Counsel has the burden of showing that protected conduct was a motivating factor in the employer's employment action. In order to meet this burden, the General Counsel must prove that the employee engaged in union activities, that the employer had knowledge of these activities, and that the employer undertook an adverse employment action against the employee because of animus towards the employee's union activities. If the General counsel's case is established, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 2258 (1994).

The General Counsel contends that the Respondent suspended and thereafter terminated Bradley because of his activities on behalf of the Union. The evidence shows that Bradley became aware of the Union's organizing campaign when he went back to work in early February 1996, after returning from his grandfather's funeral. On February 11, he went to the first organizing meeting at the Union's offices and signed a union authorization card. Bradley testified that he did not actively engage in the union campaign, hand out literature, or telephone other employees. He did attend one employee meeting at the workplace prior to his suspension and discharge in which Anderson talked about the union organizing campaign. During this meeting, both Bradley and other employees asked questions and a dialogue took place with Anderson. Bradley testified that it was known throughout the facility that Green was the chief union organizer and employees looked to her for leadership and information concerning the Union. I note that Green, who also testified in this case, did not have any discipline visited on her during this period.

[5] While this matter was being prepared for trial in early January 1997, and at the suggestion of Wiltsey, Respondent's counsel contacted former employee Jeffrey Johnson. He credibly testified that he overheard a conversation in the locker room on February 15, between Wiltsey and Bradley, recognized Bradley's voice, and heard the threat made by Bradley to Wiltsey.

The Respondent contends that the sole reason it suspended and then discharged Bradley was due to the incident of February 15. Likewise, the Respondent argues that it had no knowledge of Bradley's union activities.

The evidence shows that Bradley signed an authorization card away from the workplace and had no involvement in the union campaign at the facility. The General Counsel has not conclusively established the required nexus of union animus and knowledge of Bradley's union activities to support a violation of the Act. I also note that at each stage of the investigation, despite numerous opportunities to do so, Bradley continued to deny that the incident with Wiltsey took place or that he made any threatening statements. Contrary to this position, the evidence shows otherwise. Thus, I credit the testimony of Wiltsey, which is clear and convincing that the incident did occur on February 15. Wiltsey, shortly after the incident told Ratigan what Bradley said and early the next morning told Hoyle the same story. On that same day, February 16, Wiltsey told Anderson what Bradley said to him on the prior day and told the same version in a second and third meeting with Anderson and Attorney Flaherty on February 19 and 20. Even at the discharge meeting held on February 21, Bradley continued to deny that the incident took place. While the decision to discharge Bradley might be considered harsh, the Respondent's handbook provides for such a penalty on the first offense.

Therefore, I conclude that the Respondent did not suspend or discharge Bradley because of his union activities. Rather, the Respondent took the adverse employment actions against Bradley because of his participation in the incident of February 15, and his continued refusal to admit that it took place. Thus, I find that the General Counsel has not shown that union activity was a motivating factor in the Respondent's decision to take the adverse actions against Bradley. If there is any doubt, I further find that the Respondent has conclusively established that it would have taken the same action even in the absence of the employee's protected activity.

Therefore, I conclude that Respondent did not violate Section 8(a)(1) and (3) of the Act by suspending and terminating Bradley as alleged in paragraph 8 of the complaint.

D. *The Alleged Disparate Treatment*

The General Counsel notes that prior to the February 15 incident, Bradley had an unblemished work record. It argues that the penalty of discharge is inconsistent with prior discipline visited on employees for similar infractions. For this purpose, the General Counsel introduced into evidence several examples of employee discipline that was taken during the 1989 to 1991 timeperiod. I note that none of this discipline was taken in connection with union activities and that Anderson was not employed as the General Manager during this period. Additionally, the employee handbook that covered Bradley's discipline did not take effect until sometime in 1991, a period after the majority of the alleged disparate discipline had been taken against those employees. The records do indicate, however, that on January 25, 1991, two employees were discharged for engaging in a fistfight on company property. While one of these employees was subsequently reinstated, it establishes that the Respondent did not tolerate physical violence at its facility. The General Counsel also relies on an incident that took place in June 1995, in-

volving Supervisor Henry Wille, to support its position that the Respondent did not have a consistent disciplinary policy. The facts confirm that Wille threatened the jobs of two subordinate employees and hit an employee in the chest with a sleeve of Styrofoam cups. He was given a 5-day suspension. Anderson testified that Wille was out of line when he threatened the jobs of the two employees and hit an employee with the Styrofoam cups. He took into consideration, when imposing the discipline, that Wille apologized, acknowledged that he was wrong and that he was taking medication for depression at the time. Anderson did not consider Wille's statement to the two employees to be a physical threat and therefore, imposed a 5-day suspension under the Handbook's progressive table of penalties. In agreement with Anderson, I find that the brandishing of a box knife and uttering threatening comments that body parts would be cut is distinguishable from the Wille matter. Additionally, unlike Wille's apology and admission, Bradley continued to deny that the February 15 matter took place. Therefore, I do not find that a penalty short of discharge in the Wille matter was inappropriate or disparate in comparison to the Bradley incident. In summary, I find that the General Counsel has not established disparate treatment in the disciplinary practices of the Respondent or that the prior disciplinary actions taken against employees were less severe then in the Bradley matter.

CONCLUSIONS OF LAW

1. The Respondent, Americold Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Teamsters, AFL–CIO, Teamsters Local 838 is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee about her union activities, creating the impression that employees' union activities were under surveillance, threatening that the Respondent would start back at zero if the employees choose to be represented by a union, and that employees would lose their benefits.
4. The Respondent did not violate Section 8(a)(1) and (3) of the Act when it suspended and subsequently terminated Roderick R. Bradley.
5. The Respondent did not violate Section 8(a)(1) of the Act by telling an employee on February 24, that he had been discharged because of his union activities and the Respondent wanted to fire another employee because of that employee's union activities.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that the Respondent be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Americold Services, Inc., Kansas City, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression of surveillance of employees' union activities.

(b) Threatening employees with loss of benefits for supporting the Union.

(c) Threatening that the employer will start back at zero if the employees choose to be represented by a union.

(d) Coercively interrogating employees about their union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Kansas City, Kansas, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 1996.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

---

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."